

EXHIBIT 8
DATE 3/17/09
SB 437

March 16, 2009

Chairman Kendall Van Dyk
House Fish, Wildlife, and Parks Committee
Montana House of Representatives
Capitol Building
P.O. Box 200400
Helena, MT 59620-0400

Dear Mr. Chairman and Members of the Committee,

I am writing you, not as a lobbyist, but as a Montana citizen and a small business owner in Southwest Montana. I urge you to vote against SB 437 for the following reasons:

1) The DNRC is the state agency responsible for overseeing water rights, not DFWP. Montana water law provides for exempt permits to appropriate groundwater (85-2-306), and defines fish and wildlife as a beneficial use (85-2-102). Citizens can currently receive a groundwater certificate with fishery as the beneficial use from DNRC, but with the addition of SB 437, DFWP would not allow this use to be exercised when applying for a private pond license. Again, DFWP is not the state agency that determines when and how beneficial uses may be "put to use". In other words, it is not appropriate for a water supply issue to be regulated through a DFWP Law.

2) Proponents of SB 437 will state that the proposed change to the private pond license section 87-4-603 will only affect new fish ponds, not existing fish ponds. They will also state that SB 437 is good for Montana's wild trout fisheries. However, in the pond licensing section 87-4-606 it states:

- (3)(a) Except as provided in subsections (3)(b), (3)(c), and 4, a private fish pond license expires on February 28 of the 10th year succeeding the year of issuance or renewal.
- (3)(d) An applicant for renewal must be made before a license expires. The department shall renew the license if the licensee has not violated any condition upon which the license was granted and if the license has met all of the requirements governing private fish ponds in 87-4-603 and this section.

In fact, Montana Department of Fish Wildlife and Parks own data suggests that approximately 67% of existing private pond licenses up for renewal between 2000 and 2009 expired. What about properties with existing ponds that change ownership and don't transfer the pond license? These transfers are at the discretion of FWP based on the statute; therefore, given the proposed bill, FWP will not transfer licenses if they are permitted with an exempt water right.



These landowners, with existing ponds permitted with exempt groundwater permits, won't be able to legally re-permit their pond (because of the proposed changes to 87-4-603) and therefore, can't legally obtain disease certified fish to stock their ponds. How will they legally obtain fish for their ponds and satisfy the beneficial use of their water rights? Will they obtain fish any way they can? Will some landowners transfer fish from other ponds, creeks, rivers, or even worse, from illegal non-disease certified sources (out of state hatcheries)? Will this proposed change encourage landowners to lawfully permit new ponds? Given DFWP's limited resources for enforcement, how will they deal with these potential hazards?

The unintended consequence of this bill constitutes a deregulation of private pond licensing and legal fish procurement by law abiding private landowners. How can this be good for Montana's wild trout fisheries?

3) It should be noted that FWP already regulates private pond construction as outlined in 87-4-603 and paraphrased in the following:

- (1) Fish must be procured from a lawful source (DFWP disease certified), DFWP may designate species, and they may condition the license if there is a possibility of fish escaping from a pond into adjacent state waters.
- (2)(a)(i) A pond must be created by artificial means and not exceed 500 acres.
- (2)(a)(ii) An instream pond may not have a tributary flowing through with a presence of game fish or species of special concern.
- (2)(a)(iii) A pond may not pose an unacceptable risk to game fish or species of special concern.
- (2)(b) A private pond does not include natural ponds or bodies of water.
- (4) The department may condition the license to require the construction, implementation, and maintenance of measures or devices to prevent fish from escaping into state waters.
- (6) The department may enter land for the purposes of inspection of the pond, species of fish in the pond, presence of disease in a fish species, construction of any impoundment, dam, or fish barrier, and the connection of a pond to state waters.

For these reasons I urge you to vote no on SB 437. Thank you in advance for your consideration.

Sincerely,



Clint Campbell
Soil Scientist/Principal

Memorandum

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To: Scott Davis

Re: Effect of Amendment of § 87-4-603, MCA, as proposed in SB 437, on existing licensed fish ponds for which water rights were secured by statutory exemptions from water use permit requirements

From: Matthew W. Williams, Attorney

The proposed amendment to § 87-4-603, MCA, as set forth in SB 437, prohibits fish pond licenses from the DFWP where the appropriation of water for the attendant lake or pond is "supplied with an appropriation of groundwater that is exempt from permitting pursuant to 85-2-306." The amendment works this effect because fish pond licenses are available only for an "artificial lake or pond" or "private fish pond," and the proposed amendment would disqualify any pond that otherwise met the statutory definition of such a lake or pond where the appropriation of water for the pond was secured through statutes the exempt that use from water use permits that are ordinarily required for all new appropriations through statutes administered by the DNRC. The statutes that exempt certain uses from the requirement of water use permits define uses with no or inconsequential effects on the water resource. See § 85-2-306, MCA

Fish pond licenses generally have a term of ten years. § 87-4-606, MCA. An application for renewal of the license is contemplated by statute, where such an application is made before the expiration of the original license. A licensee is entitled to a renewal of this license "if the licensee has met all the requirements governing private fish ponds in 87-4-603 and this section." MCA 87-4-606(d).

The problem of course is that fish ponds where the appropriation is evidenced by an exempt water right will, under the proposed amendment, no longer comply with § 87-4-603. Accordingly, the proposed amendment will have the effect of prohibiting the owner of the pond from stocking fish in that pond, unless the use of the past tense "has met all the requirements governing private fish ponds in 87-4-603" is obscurely read as referencing only the law that existed at the time of the original pond licensure. As restocking of fish in a pond is often required to sustain a fishery in those ponds given the lack of spawning habitat, such a construction is a thin reed to protect the investments reflected by existing pond licenses, as the language otherwise can be construed as requiring compliance with law as of the time of application for renewal. The Montana Supreme Court in *Kafka v. DFWP*, 348 Mont. 80, ___ P.3d ___ (2009) recently sustained a like challenge to fundamental changes in game farm licenses that prohibited hunting, noting that changes in regulatory provisions may constitutionally find expression on renewal of licenses. Accordingly, only the legislature is capable of protecting the investments made in reliance on current law.

Even if the proposed amendments do not somehow, despite the statutory language, apply to the renewal of existing licenses, it is clear that they would apply to new licenses, and any oversight upon the part of a license holder by which he fails to submit a renewal application prior to the expiration of the original license will necessarily mean that he must seek a new license. The new amendment would clearly apply to any such new license application.

Finally, fish pond licenses are not transferable, absent the approval of the DFWP. § 87-4-606(5)(b), MCA. While the statute does not detail the factors the DFWP is to apply in granting or withholding such approval, presumably, that approval in part must be framed upon compliance with § 87-4-603, MCA. As fish pond with exempt water rights do not in fact comply with the new

amendment, presumably the DFWP may withhold the authority to transfer an existing fish pond license on this basis.

For the foregoing reasons, the proposed amendment to § 87-4-603, MCA that prohibits fish pond licenses for ponds filled by an appropriation through an exempt water right does threaten to undermine often significant financial investments made in reliance on current law.

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March 13, 2009

Chairman Kendall VanDyk *Via U.S. Mail & Email: kendallvandyk@gmail.com*
House Fish, Wildlife and Parks Committee
Montana House of Representatives
Capitol Building
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RE: Our file no: 65043\001

Dear Mr. Chairman and Members of the Committee:

I am writing to urge you to vote against SB 437.

I practice law in Bozeman where I specialize in water rights and water right adjudication issues. About 90 percent of my practice involves water rights. Prior to joining the Moore law firm in 1999, I was employed as a Water Master at the Montana Water Court from 1991 through 1998.

SB 437 is a bad idea because it proposes to regulate water right appropriations through the fish and game laws. The proposed legislation would remove certain types of fish ponds from the definition of "private fish pond" based on how water is appropriated for those ponds, and make it impossible to obtain a license for a fish pond using an appropriation of groundwater that is exempt from DNRC's permitting requirements.

This proposal is contrary to the Montana Constitution, Article IX, Section (3) which provides that "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people, and are subject to appropriation for beneficial uses as provided by law." Fish and wildlife is a beneficial use of water as provided in Mont. Code Ann. § 85-2-102(4). Mont. Code Ann. § 85-2-306 provides an exception to

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permitting requirements for all beneficial uses if the appropriation is less than 35 gallons per minute and 10 acre feet per year. By disallowing private fish ponds that utilize exempt groundwater, SB 437 essentially eliminates small appropriations of water for fish and wildlife as a beneficial use, contrary to the Constitution and Montana's Water Use Act. A person with a valid groundwater certificate issued by DNRC under Mont. Code Ann. § 85-2-306 will be unable to actually exercise the water right. Montana law does not provide for preferences among various beneficial uses, see Mont. Code Ann. § 85-2-102(4). Segregating and subordinating a lawful beneficial use of water under the Water Use Act through the pond licensure statutes is inconsistent with Montana water law.

Furthermore, SB 437 may constitute a taking of vested water rights for fish and wildlife purposes. Licensed fish ponds that rely on exempt groundwater sources must be re-newed every ten years. Mont. Code Ann. § 87-4-606(d) provides that an application for renewal must be made before the license expires and that renewal is subject to "the licensee...[meeting] all of the requirements governing private fish ponds in Mont. Code Ann. § 87-4-603" and 87-4-606. Because ponds using exempt groundwater are excluded from the definition of ponds that may be licensed under Mont. Code Ann. § 87-4-603(2)(b)(i) as proposed, a past licensee cannot meet the requirements for re-licensing. As a result, the previously licensed beneficial use of water for fisheries purposes cannot be renewed, and a vested water right owned by a Montana citizen under Article IX, Section 3 will be eliminated by legislative action.

As a matter of policy, the effect of this legislation is not likely to enhance the preservation of fish and wildlife in Montana. Rather, it will result in the de-licensing of currently valid fish ponds that use exempt groundwater. What will happen to these existing ponds and valid appropriations of water? It is doubtful that DFWP has the resources to require and enforce removal of fish from previously licensed ponds. Rather than to encourage compliance with DFWP's fish pond licensing regulations, the unintended result of this bill will be to create a class of de-regulated unlawful fish ponds owned by law-abiding individuals who previously complied with the Fish and Game laws and the Water Use Act to obtain a pond license and a valid appropriation of water.

Finally, SB 437 will affect real estate transactions and property values in Montana. Sellers with previously legal, licensed fish ponds will need to disclose to potential buyers that ponds using exempt groundwater will eventually become unlicensed and illegal. The value of these amenities, and the capital investments made in them by landowners, will be destroyed. Litigation over the disclosure of these issues will likely flourish.

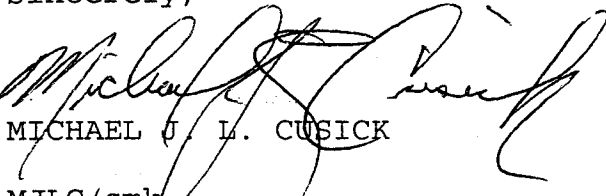
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Legislation that takes away vested property rights, in this case water rights based on a statutorily recognized beneficial use, is a bad idea. If the proponents of this bill are concerned about cumulative effects caused by exempt groundwater appropriations, then those concerns should be addressed directly by proposing amendments to the permitting exceptions of the Water Use Act found at Mont. Code Ann. § 85-2-306, including exceptions for individual domestic uses of water in subdivisions. "Back-door" regulation of a class of beneficial uses, in violation of the constitutional recognition of all beneficial uses of water, will only serve to create unintended problems and impact vested rights, rather than to meaningfully address issues of water supply.

I urge you to reject SB 437. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. L. Cusick", is written over the typed name.

MICHAEL J. L. CUSICK

MJLC/smk
SK7834.WPD